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The Uncertain Future of Tobacco Advertising in the European Community

INTRODUCTION

In recent years, much of the world's attention has turned to studying the effects cigarette smoking has on the health of smokers and non-smokers alike. In Europe, 36 percent of the adult population smokes.¹ This gives Europe the dubious distinction of having more smokers than any other World Health Organization region.²

As awareness of the hazards of smoking grows, the governments of European Community (EC) Member States have created a vast array of legislation in an effort to decrease cigarette consumption in their countries. The EC Commission lowered the permissible tar levels of cigarettes manufactured in Member States.³ Spain banned smoking on domestic airline flights.⁴ France recently passed legislation requiring non-smoking seating in eating establishments, banning smoking on commuter trains and domestic airline flights, regulating smoking in workplaces, and raising the price of cigarettes.⁵ To bring uniformity to these individual endeavors, the EC Commission proposed a Directive that effectively would ban all advertising of tobacco products, except at the point of sale.⁶ This recent proposal, adopted in 1992, is the latest in a series of tobacco advertising proposals which have been proposed since 1989 and have yet to be passed by the EC Council.⁷ In fact, seven successive meetings of the EC health ministers, including the latest meeting in May 1993, have failed to break the deadlock concerning the advertising ban.

¹ Tim Jackson, *UK Fights Ban on Tobacco Advertising*, INDEPENDENT (London), Nov. 13, 1992, at 14.

² *Id.*

³ Council Directive of 13 November 1989 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Labelling of Tobacco Products, 1989 O.J. (L 359); see also Ted Goldman, *As EC Expands Rules, Diversity May Suffer*, CHI. TRIB., Aug. 16, 1992, at 25.

⁴ Brian Love, *Training "Marlboro Man" To Try A Trabant*, Reuter Libr. Rep., Oct. 4, 1992, available in LEXIS, Europe Library, Lbyrpt File.

⁵ Judson Gooding, *An Ambivalent War Against Smoking; France*, ATLANTIC, June 1992, at 50.

⁶ Commission Amended Proposal For a Council Directive on the Approximation of Member States' Laws, Regulations and Administrative Provisions on Advertising For Tobacco Products, 1992 O.J. (C 129) 5 [hereinafter 1992 Proposal].

Part I of this Comment traces the legislative evolution of the proposed bans on direct and indirect advertising of tobacco products. Part II provides a detailed examination of the latest proposal currently under consideration in the EC Council. Part III examines the parties supporting and opposing the proposed Directive, and their respective arguments. Part IV examines the possibility of certain Member States imposing an indirect, or "back door" advertising ban in the event the EC-wide ban is not adopted. This section also examines the obstacles the European Court has imposed upon a party wishing to circumvent the "single market rules" via article 36 of the Rome Treaty. Finally, Part V concludes that a "back door" ban, if upheld by the European Court, would pose substantial barriers to free trade among Member States, and financially could burden Member States to an extent at least equal to that which would result from direct passage of the Directive.

I. PREDECESSORS OF THE 1992 PROPOSED DIRECTIVE

In 1986, the European Council adopted a resolution which established a five-year "action program" to fight cancer.⁸ One of the program's stated objectives was to improve the health and quality of life of citizens within the EC.⁹ This goal was to be achieved by reducing the number of illnesses and mortalities due to cancer, and by decreasing the potential years of life lost because of cancer.¹⁰ The first priority of the program was to develop measures to limit and reduce the use of tobacco.¹¹ These measures included rules pertaining to advertising, package labelling, tax legislation, sponsorship of

⁷ See Commission Proposal for a Council Directive on the Advertising of Tobacco Products in the Press and by Means of Bills and Posters, 1989 O.J. (C 124) 5 [hereinafter 1989 Proposal]; Commission Amended Proposal for a Council Directive on the Authorized Advertising of Tobacco Products in the Press and by Means of Bills and Posters, 1990 O.J. (C 116) 10 [hereinafter 1990 Amended Proposal]; Commission Amended Proposal for a Council Directive on Advertising for Tobacco Products, 1991 O.J. (C 167) 3 [hereinafter 1991 Amended Proposal].

⁸ Council Resolution of 7 July 1986 on a Programme of Action of the European Communities Against Cancer, 1986 O.J. (C 184) 19.

⁹ *Id.*

¹⁰ *Id.* The EC has spent 31 million ECUs since 1990 for "education, training and other aspects" of the cancer action program. *Europe Against Cancer Gets Extra Funds*, Reuter Eur. Community Rep., May 27, 1993, available in LEXIS, Europe Library, ECrt File. In May 1993, the EC agreed to increase the 1990-94 budget for the action program from 50 to 55 million ECUs (60 to 66 million dollars). *European Community Remains Divided Over Anti-Smoking Action*, AGENCE FRANCE PRESSE, May 27, 1993, available in LEXIS, Nexis Library, Omni File [hereinafter *European Community Remains Divided*].

¹¹ *Id.* at 20.

sporting and cultural events, enforcement of no-smoking laws, and extension of no-smoking areas.¹²

In an effort to further the policy objectives set forth in the European Action Program Against Cancer, the European Commission, in 1989, proposed a Directive to harmonize Member States' laws regarding advertising of tobacco products in the press and "by means of bills and posters."¹³ The proposed Directive required Member States to include health warnings on cigarette advertisements in bills, posters, and the press.¹⁴ It also detailed mandatory specifications for such warnings.¹⁵ The proposal banned all advertising for tobacco products in publications mainly intended for people under the age of 18, and prohibited advertisements which did not mention tobacco products directly, but which referred to trademarks, emblems, or distinctive symbols used mainly in connection with tobacco products.¹⁶ The Directive also explicitly stated that Member States could not cite tobacco advertising as a reason for prohibiting or restricting the sale of newspapers or magazines which complied with the Directive.¹⁷ The Commission intended that the Directive, once passed by the Council, would be implemented before the end of 1991.¹⁸

In 1990, the European Commission amended the proposed Directive, permitting advertisements to include trademarks of non-tobacco products which by chance resemble tobacco trademarks.¹⁹ Otherwise, this 1990 amended proposal remained essentially similar to the Directive proposed one year earlier. The Council did not pass either of these proposed Directives.

One year after the Commission amended the original proposal, the Commission adopted yet another amended version of the Directive.²⁰ This third 1991 proposal extended the scope of the advertising ban to include "any form of communication, printed, written, oral, by radio and television broadcast and cinema."²¹ The Commission

¹² *Id.*

¹³ See generally 1989 Proposal, *supra* note 7.

¹⁴ *Id.* art. 2. Cigarette health warnings were to be chosen from a list of 14 warnings annexed to the proposed Directive. In addition, advertisements of tobacco products other than cigarettes were to carry the general warning: "tobacco seriously damages your health." *Id.*

¹⁵ *Id.* Specific warnings were required to be printed "against a contrasting background on inserts and in such a way as to guarantee an equal frequency of display for each warning. . . ."

¹⁶ *Id.* arts. 3, 4.

¹⁷ *Id.* art. 5.

¹⁸ *Id.* art. 6.

¹⁹ See generally 1990 Amended Proposal, *supra* note 7, art. 3.

²⁰ See 1991 Amended Proposal, *supra* note 7.

²¹ *Id.* art. 1.

amended the 1991 proposed Directive in 1992, but only slightly. The essential terms of the 1991 and 1992 proposed Directives are identical. A more detailed examination of the 1992 proposal,²² currently under consideration by the EC Council, is warranted.

II. THE 1992 PROPOSAL

The 1992 proposal, like its immediate predecessor, governs all advertising forms and media.²³ The 1992 proposal establishes a closer correlation between the danger smoking poses to the European Community and the need for a ban on tobacco advertising.²⁴ Among the Directive's principal provisions is a complete ban of tobacco advertising in all newspapers, magazines, billboards, posters, cinema, and television.²⁵ Tobacco advertising would be limited to those establishments that specialize in the sale of tobacco, and maintain enclosed indoor premises to serve customers.²⁶ Advertising in such establishments would not be permitted to be visible from outside the premises.²⁷ Also, the cost-free distribution of tobacco products would be banned entirely.²⁸

Under article 2 of the Directive, indirect advertising of tobacco products would be limited or banned entirely.²⁹ For example, a tobacco trademark, logo, or other distinctive feature could not be used to advertise non-tobacco products such as lighters, chewing gum, or clothing.³⁰ Additionally, tobacco companies could not use the established reputation of a non-tobacco product, such as a clothing logo, to promote new brands of cigarettes.³¹ The proposal would

²² See generally 1992 Proposal, *supra* note 6.

²³ See Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23. Television advertising of tobacco products has been banned in the EC since 1989. *Id.*

²⁴ 1992 Proposal, *supra* note 6, at 6. "[T]obacco consumption constitutes a very important death factor each year in the Member States of the European Community;. . . Advertising plays a fundamental role in promoting smoking, particularly among young people. . . ." *Id.*

²⁵ *Id.* art. 2.

²⁶ *Id.* art. 7.

²⁷ *Id.* art. 3.

²⁸ *Id.* art. 2.

²⁹ See *id.*

³⁰ See *id.*

³¹ *Id.* For example, a new cigarette introduced in the French market was called Chevignon, the name of a well-known manufacturer of clothing for young people. The cigarette was withdrawn subsequently because of public opposition to this marketing technique. See *Chevignon Backs Down on Cigarettes*, BUSINESS EUR., Apr. 19, 1991, available in LEXIS, Europe Library, Buseur File. Under the 1992 Directive, regardless of public opinion, this type of

allow tobacco companies to sponsor cultural and sporting events, but they could not use their company trademarks, logos, or characteristic signs, because such a display would amount to indirect advertising of a tobacco product.³² Furthermore, this Directive would harmonize the tobacco advertising laws of all the EC Member States by establishing minimum restrictions with which the Member States must comply.³³ Without harmonization, countries such as Portugal and Italy, which have already implemented national legislation banning tobacco advertising, can bar the importation of magazines and newspapers from other countries which have not banned tobacco advertising.³⁴

The 1992 proposal, as originally drafted, required Member States to adopt and publish the laws, regulations, and administrative procedures necessary to comply with the Directive by July 31, 1992.³⁵ The Directive, however, has not been passed by the European Council because Britain, Germany, The Netherlands, Denmark, and Greece formed a blocking majority, thus forcing the Council to postpone a vote on the Directive until November, 1993 at the earliest.³⁶

III. DEBATE WITHIN THE COUNCIL

Since first presented for consideration in 1989, the tobacco advertising ban has caused vehement debate within both the Commission and the Council. Member States on both sides of the debate have

marketing would not be permitted. Eduardo Cue, *Europe—Cigarettes*, UPI, May 15, 1991, available in LEXIS, Europe Library, UPI File. There are two exceptions, however, to this prohibition. If a company makes at least twice the amount of revenue from its non-tobacco products than it does from its tobacco products, it may use the company logo on its non-tobacco products. See 1992 Proposal, *supra* note 6, art. 2(a)–2(b). Dunhill is an example of a French company that fits the exception. Cue, *supra*. Also, if a company developed its non-tobacco brand or trademark before it developed a tobacco product, it may continue to use its logo on the non-tobacco products. 1992 Proposal, *supra* note 6, art. 2(a)–(b).

³² *Commission Proposes Limit on Tobacco Advertising*, 2 Common Mkt. Rep. (CCH) 95,913 at 52,214 (1992) [hereinafter Market Reporter].

³³ 1992 Proposal, *supra* note 6, art. 5. Countries could, however, establish stricter restrictions than are required by the 1992 Directive, as long as the restrictions do not violate the terms of that Directive. *Id.* "This Directive shall not preclude Member States from introducing measures concerning advertising for tobacco products . . . which they deem necessary to guarantee the health protection of their citizens, provided that such measures comply with this Directive." *Id.*

³⁴ Market Reporter, *supra* note 32, at 95,913.

³⁵ 1992 Proposal, *supra* note 6, art. 6.

³⁶ James Erlichman and Julie Wolf, *Health Warning Defeat Surprises Tobacco Firms*, GUARDIAN, June 23, 1993.

remained firmly committed to their positions over the past five years. The deadlock presently continues.

A. *Support*

Currently, the Directive is supported by France, Italy, Portugal, Spain, Belgium, Ireland, and Luxembourg which together command only forty three of the seventy six total votes allocated among the Council members.³⁷ A minimum of fifty four votes is needed to adopt a Directive.³⁸ France, Italy, Portugal, and Spain already have passed domestic legislation banning tobacco advertising.³⁹ These countries argue that an EC-wide ban is necessary to ensure that all publications circulate freely within the Member States and comply with the national laws of all EC countries.⁴⁰

More importantly, supporters urge adoption of the advertising ban, insisting that such a ban will reduce significantly the demand for tobacco products by decreasing the number of new smokers.⁴¹ It is estimated that 440,000 people in the EC die each year from tobacco-related illnesses.⁴² Some supporters of the ban argue that the main aim of tobacco advertising is to replace the smokers who

³⁷ *EC Commentaries*, EC Institutions and the Decision Making Process, Jan. 21, 1993, at §3.3, available in LEXIS, Intlaw Library, Eurscp File.

³⁸ *Id.* Under the qualified majority system, Council decisions require at least 54 out of a total of 76 votes in order to be adopted. The votes of the Member States are weighted as follows: Belgium = 5, Denmark = 3, Germany = 10, Greece = 5, Spain = 8, France = 10, Ireland = 3, Italy = 10, Luxembourg = 2, Netherlands = 5, Portugal = 5, United Kingdom = 10. *Id.* The votes of Germany and the United Kingdom, along with any other one country, is sufficient to block passage of the Directive. *Id.*

³⁹ Eduardo Cue, *EC Proposes Total Ban On Cigarette Advertising*, UPI, May 16, 1991, available in LEXIS, Europe Library, UPI File [hereinafter *EC Proposes Total Ban*].

⁴⁰ Jackson, *supra* note 1. Luxembourg imports more than 80% of the publications it sells. *Id.* Luxembourg imports almost 50% of its publications from Britain. *Id.* These countries reason that, from an economic standpoint, they could not impose national advertising bans on their domestic publications while permitting the importation of British media containing tobacco advertisements. *Id.* Thus, in the event that Britain did not enact a national ban of its own, Ireland and Luxembourg would be forced to prohibit British imports. For further discussion of "back door" bans, see discussion, *infra* part IV.

⁴¹ *EC Proposes Total Ban*, *supra* note 39.

⁴² *Id.* This amounts to one EC citizen every minute. *EC Parliament Backs Tobacco Advert Ban*, Reuter Libr. Rep., Feb. 11, 1992, available in LEXIS, Europe Library, Lbyrpt File [hereinafter *EC Parliament*]. Although most sources estimate the death toll at 440,000, the European Cancer League estimates the death toll at 450,000. *Anti-Smoking Campaigners Seek E.C. Tobacco Advertising Ban*, AGENCE FRANCE PRESSE, Sept. 24, 1992, available in LEXIS, Europe Library, AFP File [hereinafter *Anti-Smoking Campaigners*]. One reporter reports that 516,000 EC citizens died "tobacco deaths" in 1985, and predicts that in 1995, 570,000 will die from tobacco related illnesses. Jackson, *supra* note 1.

die each year with young smoking recruits: youngsters who are particularly susceptible to advertising.⁴³

Vasso Papandreou, EC Health and Social Affairs Commissioner until 1993, is a vigorous advocate of the advertising ban.⁴⁴ She argued that studies conducted independently of the tobacco industry conclusively prove that banning cigarette advertising causes a decrease in cigarette consumption.⁴⁵ In October 1992, Clive Smee, the Chief Economic Advisor to the British Department of Health, issued a report based on studies of advertising bans imposed in Norway, Finland, Canada, and New Zealand.⁴⁶ The report concluded that advertising bans in those countries resulted in decreases in smoking "on a scale that could not reasonably be attributed to other factors."⁴⁷ In 1992, the European Parliament voted to support an EC-wide ban.⁴⁸

British Health Secretary, Virginia Bottomley, remains firmly opposed to such a ban, contending that the empirical research fails to prove a correlation between cigarette advertising and consumption. This position is increasingly under attack by factions within the British government itself.⁴⁹ In urging the British government to adopt the EC ban, the Commons Health Select Committee claimed that "tobacco advertising . . . depicts smoking as a socially acceptable

⁴³ *Anti-Smoking Campaigners*, *supra* note 42.

⁴⁴ See *European Community, EC Commission Proposes Total Ban on Cigarette Ads in Member States*, Daily Rep. for Executives (BNA), May 16, 1991, available in LEXIS, Nexis Library, Omni File.

⁴⁵ John Lewis, *UK: Tobacco Ad Ban Falls Short of Proof*, MARKETING, Nov. 5, 1992, available in LEXIS, Nexis Library, Mrktng File.

⁴⁶ *Id.*

⁴⁷ *Id.* The European Bureau for Action on Smoking Prevention reports that the New Zealand ban, imposed in December 1990, caused, within six months of the ban, a 15.4% decrease in the amount of tobacco sold and a 10.5% decrease in the number of smokers. Love, *supra* note 4. Papandreou cites a study in Canada that shows that the number of smokers older than 15 years fell 2% for men and 3% for women in the year following the enactment of its advertising ban. *Cigarette Manufacturers Oppose Ban On Tobacco Advertising*, EUR. REP., Nov. 18, 1992, available in LEXIS, Nexis Library, Eurprt File [hereinafter *Cigarette Manufacturers Oppose Ban*]. In Norway, the number of smokers between the ages of 13 and 15 dropped 7% during the 15 years following its ban (1975–1990). *Id.* Cigarette manufacturers, however, insist that a reported drop in consumption in Denmark was due to an increase in the price of cigarettes, rather than the advertising ban. *Id.* Additionally, they point out that in Norway, although consumption among teenagers declined, consumption among women rose during the same period. *Id.*

⁴⁸ *EC Parliament*, *supra* note 42. The vote was 150 to 123 with 12 abstentions. *Id.*

⁴⁹ Melinda Wittstock, *MEPs Vote To Ban Tobacco Adverts*, THE TIMES (London), Feb. 12, 1992. Popular opinion in Britain seems to favor such a ban. A January 1992 poll by British Social Attitudes found that 63% of Tory voters, 65% of Labour voters, and 67% of Liberal Democrats support a ban. *Id.*

or even desirable habit, and helps to persuade children that smoking cannot really be dangerous."⁵⁰ The Committee stated that a ban would reduce the 75,000 smoking-related deaths per year in Britain by decreasing the number of young smokers.⁵¹

In addition to claims that tobacco advertising recruits new smokers, supporters argue that it is hypocritical for the EC to claim it wants to eradicate deaths from cancer when it gives \$1.7 billion in subsidies to tobacco farmers each year, while giving only \$14 million per year to fight cancer.⁵² Advocates of the advertising ban argue that even if the ban does not result in an immediate drop in tobacco consumption, it is a step in the direction of what they consider to be the EC's ultimate goal—eliminating cigarettes from the collective conscience of its citizens.⁵³ Thus far, these arguments have failed to win the needed support within the EC Council.

B. *Opposition*

The blocking minority, comprising Britain, Germany, The Netherlands, Denmark,⁵⁴ and Greece, asserts that research has failed to establish a connection between cigarette advertising and total cigarette consumption.⁵⁵ The Confederation of EC Cigarette Manufacturers (CECCM)⁵⁶ argues that the ban threatens to thwart the EC government's commitment to a free market economy.⁵⁷ The Confederation also insists that the ban will inhibit commercial investment.⁵⁸

⁵⁰ *U.K. Parliamentarians Want Tobacco Ads Banned*, Reuter Fin. Rep., Jan. 20, 1992, available in LEXIS, Nexis Library, Finrpt File [hereinafter *U.K. Parliamentarians*]. This argument is put forth to dispute the tobacco industry's claim that advertising affects only brand choice and does not recruit new smokers. *Cigarette Manufacturers Oppose Ban*, *supra* note 47. In Britain, five out of six adult smokers began smoking before the age of 15. *U.K. Parliamentarians*, *supra*. Between 1980 and 1990, the number of adult smokers dropped from 39% of the population to 30%, but the number of teenage and child smokers remained "largely unchanged." *Id.*

⁵¹ Joanne Merriweather, *Britain—Smoking*, UPI, Jan. 20, 1993, available in LEXIS, Nexis Library, UPI File.

⁵² *Anti-Smoking Campaigners*, *supra* note 42.

⁵³ See *Cigarette Manufacturers Oppose Ban*, *supra* note 47.

⁵⁴ Although Denmark currently opposes the proposed Directive, it has indicated a willingness to support an advertising ban provided such a ban would not prohibit the foreign publications importation containing cigarette ads. *European Community Remains Divided*, *supra* note 10.

⁵⁵ See Cue, *supra* note 31.

⁵⁶ *EC Tobacco Manufacturers Hit Out At Advertising Ban Report*, Reuter Eur. Community Rep., Jan. 20, 1993, available in LEXIS, Europe Library, ECrpt File. The CECCM represents most of the major private EC manufacturers which together produce roughly two-thirds of the cigarettes manufactured in the EC. *Id.*

⁵⁷ *EC Parliament*, *supra* note 42.

⁵⁸ Cue, *supra* note 31.

Further, it argues that advertising affects only brand choice and not the level of market consumption.⁵⁹ Therefore, it reasons, preventing smokers from receiving brand information via advertisements, will succeed only in removing the principle means of competition among manufacturers.⁶⁰

The CECCM accuses countries such as France, Spain, Italy, and Portugal of advocating a ban to protect their own financial self-interests.⁶¹ These countries have state-owned monopolies on cigarette production.⁶² The price of the state-manufactured cigarettes is lower than the price of imported brands.⁶³ Privately-manufactured cigarettes present stiff competition to these national brands.⁶⁴ CECCM alleges that these countries wish to ban advertising because without advertising, consumers will choose their brand of cigarettes based on price alone, and thus the national brands will enjoy a windfall.⁶⁵ Even worse, the industry warns that if an advertising ban is enacted, private manufacturers will be forced to cut their prices and cigarette consumption consequently will rise rather than fall.⁶⁶ Tobacco lobbyists claim that this ban will set a frightening precedent for similar advertising bans of other legal but unhealthy products such as alcohol.⁶⁷

Those opposed to the proposed ban argue that voluntary restraint agreements, like those currently in force in Britain, are sufficient safeguards in prohibiting advertising from targeting the young.⁶⁸ Such voluntary agreements are entered into by industrialists, advertising agencies, and government agencies, and set out a code of conduct with clearly defined rules to be respected regarding tobacco

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Cigarette Manufacturers Oppose Ban*, *supra* note 47. Conversely, supporters of the ban accuse the Member States opposing the ban of acting only out of their own financial interests. Supporters point out that the Netherlands is the EC's largest exporter of cigarettes, Britain is home to the most tobacco multinationals, Germany is the biggest manufacturer of cigarettes, and Greece is a major tobacco grower. *Anti-Smoking Campaigners*, *supra* note 42.

⁶² *Cigarette Manufacturers Oppose Ban*, *supra* note 47. In France, for instance, the government-owned Societe d'Exploitation Industrielle des Tabacs et Allumettes (SEITA) has the sole right to manufacture cigarettes within the country, and controls the distribution of almost all imported cigarettes. Gooding, *supra* note 5.

⁶³ *Cigarette Manufacturers Oppose Ban*, *supra* note 47.

⁶⁴ The CECCM states that national tobacco companies in France, Italy, Spain, and Portugal presently are losing market share on account of competition from private manufacturers. *Id.*

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Cigarette Manufacturers Oppose Ban*, *supra* note 47. The Commission has denied categorically that this ban would pave the way for similar bans of other products. *Id.*

⁶⁸ *Id.*

advertising.⁶⁹ Opponents of the ban point out that in the United Kingdom, Germany, The Netherlands, and Greece from 1975 to 1989, average cigarette consumption decreased by between 3 percent and 25 percent through voluntary agreements.⁷⁰

Tobacco companies insist that the sports industry could be harmed greatly by the Directive's prohibition on tobacco industry sponsorship of sporting events. Opponents estimate that British sports could lose between 7.5 million and 12 million pounds (11.1 million to 17.8 million dollars)⁷¹ in sponsorship per year, with a total European loss of 100 million pounds (148 million dollars).⁷² Not only does the ban threaten the existence of professional sports events,⁷³ but the Tobacco Advisory Council points out that much of

⁶⁹ Ray Castle, *UK: The Burning Issue—Cigarette Advertising*, SUPERMARKETING, Jan. 22, 1993, available in LEXIS, Nexis Library, TXTLNE File. In Britain, the Cigarette Code, introduced in 1975 and amended over the years, results from negotiations with the cigarette manufacturers, the Department of Health, the Tobacco Advisory Council (an industry group), the Imported Tobacco Products Advisory Council, and the Advertising Standards Authority. *Id.* The following are the principal rules set forth in the British Cigarette Code: Advertising cannot:

- 1) Portray smoking as sexy
- 2) Link cigarettes with career success or personal attractiveness
- 3) Depict persons smoking
- 4) Encourage people to consume more cigarettes or buy in bulk
- 5) Recruit young people to smoke
- 6) Be distributed within sight of school buildings
- 7) Suggest that it is normal to smoke or that it is abnormal to be a non-smoker
- 8) Include or imply any endorsement of smoking by well-known individuals
- 9) Appear in any publication directed wholly or mainly at young people
- 10) Depict people in advertisements who appear younger than 25 years old.

Advertisements can:

- 1) Persuade smokers to remain brand loyal
- 2) Encourage smokers to switch to the advertised brand
- 3) Mention the smoking characteristics of a product, provided no health claim is implied
- 4) Claim that a brand is growing in popularity, if true, provided this does not imply an increase in smoking throughout the general population. *Id.*

⁷⁰ *Cigarette Manufacturers Oppose Ban*, *supra* note 47. British lobbyists contend that the number of new smokers in Britain, under a system of voluntary regulation, is lower than in some countries where advertising bans exist. Wittstock, *supra* note 49. Action on Smoking and Health, however, insists that voluntary agreements do not limit the amount of advertising, they simply direct it from one medium to another. Zena Cardwell, *UK: Issue of the Week—5 Things to Know About . . . Tobacco Ads*, MEDIA WEEK, Feb. 12, 1993, available in LEXIS, Nexis Library, Mediwk File.

⁷¹ Currency conversion based on Bank of Boston's official exchange rate of 1.48 dollars per pound, as of 9/9/93 [hereinafter Bank rate].

⁷² *Id.*; see also Wittstock *supra* note 49; *UK: Sponsorship—Burning A Hole In Sport's Pocket*, PR WEEK, Nov. 26, 1992, available in LEXIS, Nexis Library, Omni File [hereinafter *Burning*

the sponsorship revenue goes to improving sports facilities for amateur athletes.⁷⁴

Magazine and newspaper publishers also oppose the advertising ban because the media industry would suffer severe losses if an EC-wide ban were adopted.⁷⁵ Currently, the tobacco industry spends approximately 279 million pounds (413 million dollars) each year on advertising in the EC.⁷⁶ This expense represents 1.6 percent of the EC's total yearly advertising expenditure.⁷⁷

The tobacco industry insists that the data on which the EC Commission has relied in proposing an advertising ban is "seriously flawed, muddled, and unsubstantiated."⁷⁸ It alleges that the Smee report was published only as a consultative document and that the Commission erroneously has attempted to portray the report as the definitive word on tobacco advertising.⁷⁹ In fact, at least one advertising consultant has said that other studies of EC countries, where bans currently exist, show that advertising bans do not decrease cigarette consumption, and suggest, "but do not prove, that [the bans] may have had the opposite effect to that intended."⁸⁰

a Hole] (reporting that BBC viewers of sporting events in 1991 could have watched up to 25 minutes of tobacco company or cigarette brand images every hour).

⁷³ The existence of the Rugby League's Regal Trophy, the UK's longest-running sports sponsorship, and the World Snooker Championships could be threatened by a sponsorship ban. *Burning A Hole*, *supra* note 72.

⁷⁴ *Id.*

⁷⁵ *Id.* The German Association of Magazine and Newspaper Publishers alleges that the proposed Directive "represent[s] a blatant invasion of the EC into the public health sector, in relation to which the Community has extremely limited jurisdiction if at all." *Id.* In its annual report and accounts, published in December 1991, representatives of the British publishing industry warned that "attempts to ban tobacco and some other forms of advertising will not make business any easier in the coming years." United Newspapers PLC—1991 Annual Report and Accounts, Full-Text ICC Quoted Company Annual Reps., Dec. 31, 1991, *available in* LEXIS, Company Library, ICCCO File. An advertising industry report noted that "[a]gencies with large clients which advertise tobacco . . . could stand to lose a significant amount of revenue due to restrictions." Full-Text ICC Keynote Market Reports, Key Note Advertising Agencies—An Industry Sector Analysis, May 18, 1990, *available in* LEXIS, Company Library, ICCMKT File.

⁷⁶ Bank rate, *supra* note 71; Jackson, *supra* note 1.

⁷⁷ *Cigarette Manufacturers Oppose Ban*, *supra* note 47. In the Netherlands, the proportional revenue loss placed at risk by a ban is even greater. Its tobacco advertising comprises 2.8% of its total advertising revenue. *Id.*

⁷⁸ Chris Mihill, UK: *MPs Call For Ban On Cigarette Adverts*, GUARDIAN, Jan. 21, 1993.

⁷⁹ UK: *Tobacco Ad Ban Quandary*, SUPERMARKETING, Jan. 29, 1993, *available in* LEXIS, Nexis Library, Txtlne File.

⁸⁰ UK: *Reports Dismiss Claim That Ad Ban Would Cut Down Smoking*, MEDIA WEEK, Feb. 5, 1993, *available in* LEXIS, Nexis Library, Mediwk File. Opponents of the ban also cite statistics which show that in the (former) USSR, where tobacco was never advertised, smoking rose by 25% in the last decade, whereas in Britain, where advertising is widespread but regulated, smoking fell by roughly 25% during the same period. Love, *supra* note 4.

The blocking minority within the EC Council, given their various objections to a ban, argue that the Council should instead: 1) raise cigarette prices in many Member States to bring them more in line with the prices in Britain; 2) examine other factors such as stress, parental influence, and peer group pressure; 3) spend more on health education to raise awareness of the dangers of smoking; 4) raise cigarette taxes;⁸¹ and 5) end the \$2 billion yearly subsidy to European tobacco growers.⁸² They emphasize that no advertising ban should be contemplated until there is clear evidence that such a ban will decrease consumption substantially.⁸³

In an effort to convince the EC Council that an outright ban is unnecessary to achieve the desired reductions in tobacco consumption, countries such as Britain and Germany are initiating individual measures to reduce tobacco consumption.⁸⁴ Britain plans to produce a strategy in late 1993 to help other Member States set target levels to reduce smoking.⁸⁵ Additionally, the German Cigarette Industry Association announced it will ban outdoor advertising of cigarettes within 100 meters of all schools and youth centers, ban the distribution of free cigarettes, show cigarette warnings after commercials shown in cinemas, and impose a requirement that warnings constitute at least 10 percent of all outdoor and print advertisements.⁸⁶

IV. THE GREATER CONSEQUENCES TO THE EC OF A DIRECTIVE DEFEAT

In order to enact this harmonization law, the supporting Member States will have to "win over" the eleven votes they are currently lacking. Such a feat would require supporters to convince the oppo-

⁸¹ *Health Council Searches For Words On Smoking*, Reuter Eur. Community Rep., May 26, 1993, available in LEXIS, Europe Library, Lbyrpt File. Supporters, however, are quick to point out that despite Germany, Denmark, and Britain having the highest prices for cigarettes, these countries rank second, third, and fourth, respectively, in cigarette consumption among EC countries. *Id.*

⁸² John Lewis, *UK: UK Seeks Shift In Smoking Row*, MARKETING, Oct. 15, 1992, available in LEXIS, Nexis Library, Omni File; Neville Nankivell, *Smoking Fight*, FIN. POST (Britain), Nov. 14, 1992, at 19, available in LEXIS, Nexis Library, Finpst File.

⁸³ Lewis, *supra* note 45.

⁸⁴ Brian Love, *Flynn Vows To Fight On Despite Tobacco Adverts Deadlock*, Reuter Eur. Community Rep., May 27, 1993, available in LEXIS, Europe Library, ECrtpt File.

⁸⁵ *Id.* According to Brian Mawhinney, a British junior health minister, the number of British smokers has dropped from 45% of the adult population to 30%, over the past 18 years. Britain has set a target to cut the number of adult smokers to 20% by the year 2005. *Id.*

⁸⁶ *Germans Limit Tobacco Ads*, EUOMARKETING, May 4, 1993, available in LEXIS, Nexis Library, Buseur File.

sition that the long-term financial benefits in the form of health cost savings will outweigh the revenues EC states will lose from tobacco advertisers, growers, and the tobacco industry in general. Given the current climate within the EC Council, it appears unlikely that this Directive will be enacted.

A defeat of this Directive would not put an end to the issue of tobacco advertising within the EC, however. Banning advertising of tobacco, a product which is known to cause cancer and other fatal diseases in smokers,⁸⁷ is precisely the type of issue which might allow Member States to circumvent the EC's "single market" rules.⁸⁸ Although one of the primary goals of the European Community is to effectuate the free circulation of goods among all Member States, article 36 of the Treaty Establishing the European Economic Community (EEC Treaty) allows the protection of health and life to take precedence over the "single-market" rules.⁸⁹

Even if the Directive does not pass, individual Member States may be able to impose an indirect ban of tobacco advertising by prohibiting the importation of foreign magazines and newspapers containing such advertisements.⁹⁰ Papandreou warned those countries opposing the ban that protecting citizens from the dangers of tobacco advertising is tantamount to protecting their health and life.⁹¹ National bans already exist in Spain, Italy, Portugal, and France.⁹² In late 1992, both Italy and Portugal announced that they would consider stopping imports of foreign publications containing tobacco

⁸⁷ Cigarette smoking has been linked to three main categories of diseases: cancers, cardiovascular diseases, and chronic obstructive lung diseases. See, e.g., Koop, Preface to United States Department of Health and Human Services, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease: A Report of the Surgeon General*, at xiii (1984); Brandt, Foreword to the United States Department of Health and Human Services, *The Health Consequences of Smoking: Cancer: A Report of the Surgeon General*, at V (1982).

⁸⁸ Julie Wolf, *EC: EC States With Tobacco Ad Ban May Bar British Publications*, *GUARDIAN*, Nov. 14, 1992.

⁸⁹ See *id.*; see also TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], art. 36. Article 36 states: "[t]he provisions of Article 30 to 34 shall not preclude prohibitions on imports, exports or goods in transit justified on grounds of . . . the protection of health and life of humans. . . . Such prohibitions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." EEC TREATY, art. 36.

⁹⁰ *Magazines With Tobacco Advertising Face Ban In EC States*, *Reuter Libr. Rep.*, Nov. 12, 1992, available in LEXIS, Europe Library, Lbrpt File.

⁹¹ *EC: Member States May Ban Imports of Newspapers Containing Tobacco Advertising*, *AGENCE EUR.*, Nov. 18, 1992, available in LEXIS, Europe Library, All eur File.

⁹² *EC Uses Stealth To Fuel Smoking War*, *CAMPAIGN*, Nov. 20, 1992, available in LEXIS, Nexis Library, Omni File.

advertising.⁹³ France, however, announced it would not exclude such publications.⁹⁴

Manufacturers claim that the legality of an indirect ban, justified under article 36, would not be upheld by the European Court because the health risk resulting from tobacco advertising has not been proven definitively.⁹⁵ If Italy, for instance, attempted to ban imports of British newspapers and magazines under article 36, it most likely would have to prove not only that a correlation exists between tobacco advertising and cigarette consumption, but also that its citizens' health could not be protected adequately through an alternative course of action that would be less restrictive of free trade.⁹⁶ Given the difficulty of obtaining uncontroverted evidence linking tobacco advertising with cigarette consumption, this is a heavy burden to satisfy.

Despite this challenge, if a Member State were to defend a "back door" ban of foreign media publications successfully, such a ban would have severe consequences for the European Community. In countries such as Ireland and Luxembourg, which import at least half of their publications from Britain, banning imports of non-complying British media would defeat the purpose of creating a single market for the free circulation of goods within the European Community. Were the European Court to accept the "protection of health and life" rationale, Britain and its opposition counterparts may find the financial interests they seek to protect harmed more by their inability to export to complying countries than they would be by an inability to advertise tobacco products. If the Directive is passed eventually, or if a back door ban is allowed by the European Court, the United States could find its publishing industry greatly harmed as well. If, however, the Directive does not pass and the European Court were to hold that article 36 of the EEC Treaty does not justify the blocking of imported cigarette ad-carrying media, Britain, Germany and the other opposing parties will have saved their tobacco industries from substantial potential losses.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Sarah Lambert, *Ministers in Fog Over Tobacco Advertising*, INDEPENDENT (London), Nov. 14, 1992, at 9.

⁹⁶ Case 40/82, *Commission v. U.K. and No. Ir.*, 1982 E.C.R. 2793, 3 C.M.L.R. 497 (1982). The European Court held, that "a Member State which invokes Article 36 . . . cannot confine itself to stating that the measures are one of the grounds listed in Article 36. . . . It must demonstrate that those measures are essential for the attainment of the aim pursued and that there is no equally effective alternative which would create less serious obstacles to trade." *Id.*

CONCLUSION

The blocking majority within the EC Council effectively has prevented the EC from banning tobacco advertising uniformly throughout the Community. The Member States comprising this majority seek to protect the tobacco industry from tremendous potential revenue losses. If the comprehensive ban on tobacco advertising is passed, the tobacco and advertising industries do stand to lose tremendous amounts of revenue. If the EC Council majority definitively blocks the Directive, however, these industries should not breathe a collective sigh of relief. It is probable that certain Member States nonetheless will attempt to ban the importation of media which carry tobacco advertisements, under article 36. If such a back door ban is implemented, it might exact greater costs on the Community's internal market than would occur in the wake of an advertising ban. If the past two years are an adequate indicator of the EC Council's future action, it is unlikely that the Directive, as currently proposed, will pass. It remains to be seen whether the EC Council will lend credibility to its stated concerns of fighting cancer, or whether, instead, individual Member States will be left to fight this battle on their own.

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